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VIA EMAIL & U.S. MAIL

Ms. Alice Yeh
Remedial Project Manager
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
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Re: Covanta Essex Company Nexus and Request for *De Minimis* Settlement
Lower Passaic River Study Area Operable Unit of the Diamond Alkali Superfund Site

Dear Ms. Yeh:

This report is submitted on behalf of Covanta Essex Company ("Covanta") regarding its alleged nexus to the Lower Passaic River Study Area Operable Unit of the Diamond Alkali Superfund Site (the "LPRSA"). Please add this letter and enclosure to the administrative record for the LPRSA.

The purpose of this report is to document the facts concerning Covanta's alleged connection to the LPRSA and to provide the basis for a *de minimis* settlement. This report contains the following sections: **Part I** provides an executive summary; **Part II** summarizes the facts concerning Covanta's alleged nexus to the LPRSA; **Part III** discusses whether those facts support the conclusion that Covanta is liable for LPRSA response costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"); **Part IV** describes Covanta's expenditures and cooperation to date concerning the LPRSA; and **Part V** explains why Covanta is eligible for a *de minimis* settlement.

I. EXECUTIVE SUMMARY

Covanta owns and operates the Essex County Resource Recovery Facility ("ECRRF"), located at 183 Raymond Boulevard and 66 Blanchard Street in Newark, New Jersey (the "Property"), under a long-term agreement with the Port Authority of New York and New Jersey ("Port Authority"). Notably, the ECRRF was created as a joint effort between the City of Newark, the County of Essex and the Port Authority (as project developer) to effectuate the Essex County Utility Authority's Solid Waste Management Plan. The ECRRF serves the refuse disposal needs of 22 municipalities in Essex County and the surrounding region, including

portions of New York City. The ECRRF processes 2,800 tons per day of municipal solid waste (MSW) and generates approximately 500 million kilowatts of electricity each year – enough to operate the plant and provide power to 65,000 homes.

Covanta did not directly discharge hazardous substances to the LPRSA, and there have been no allegations that it did so – in stark contrast to the ***intentional discharges*** of 2,3,7,8-tetrachlorodibenzo-p-dioxin ("2,3,7,8-TCDD") and other hazardous substances from 80 and 120 Lister Avenue in Newark, New Jersey (the "Lister Site"), for which Tierra Solutions, Inc., Maxus Energy Corporation, and Occidental Chemical Corporation (collectively, "TMO") are responsible. *Diamond Shamrock Chem. Co. v. Aetna Cas. & Surety Co.*, 258 N.J. Super. 167, 183 (App. Div. 1992) ("A number of former plant employees testified concerning Diamond's waste disposal policy which essentially amounted to 'dumping everything' into the Passaic River."); *id. at* 197 (the Lister Site "intentionally and knowingly discharged hazardous pollutants with full awareness of their inevitable migration to and devastating impact upon the environment"); *id. at* 213 ("The only conclusion to be drawn is that Diamond's management was wholly indifferent to the consequences flowing from its decision [to run its reactor at high temperatures]. Profits came first.").

Instead, Covanta allegedly is responsible for hazardous substances in stormwater that discharged from the Property into the LPRSA through two ditches that later were converted to two stormwater outfalls. This alleged nexus is not supported by the facts. As discussed in this report, the facts show the following:

- The Property was vacant and subjected to illegal dumping prior to 1978, purchased by the City of Newark Redevelopment and Housing Authority (the "NRHA") in 1978, sold to the Port Authority in December 1987, and thereafter leased to American Ref-Fuel Company of Essex County ("ARF"), now known as Covanta, effective on or about January 31, 1988. (The Port Authority remains the owner of the Property).

- Covanta commenced construction of the ECRRF in February 1988. The ECRRF began operating in November 1990.

- There was pre-existing contamination at the Property prior to construction and operation of the ECRRF, which was investigated and remediated to the satisfaction of the New Jersey Department of Environmental Protection ("NJDEP").

- Covanta did not discharge any of the contaminants of concern that are necessitating remedial action in the LPRSA, namely (i) dioxins/furans, predominantly 2,3,7,8-TCDD; (ii) polychlorinated biphenyls ("PCBs"); (iii) dichlorodiphenyl-trichloroethane and its breakdown products ("DDx"); and (iv) mercury (collectively, the "Remedial Action COCs").

- There is no evidence that Covanta's operation of the ECRRF resulted in hazardous substances in stormwater that discharged to the LPRSA, especially since the ECRRF has been and is a zero discharge facility since 1997.

- The only LPRSA contaminant of concern ("COC") present in stormwater discharged from the Property at any time was lead, and this COC is attributable to pre-existing contamination on the Property, offsite sources, and backflow from the LPRSA during high tide events.

In sum, the evidence shows that Covanta has ***improved*** the environmental condition of the Property, has not discharged anything to the LPRSA, and is not responsible for LPRSA contamination. Nevertheless, Covanta has spent hundreds of thousands of dollars cooperating with the United States Environmental Protection Agency ("USEPA") to perform the Remedial Investigation and Feasibility Study ("RI/FS") and River Mile ("RM") 10.9 removal action for the LPRSA. With the issuance of the Record of Decision for the lower 8.3 miles of the LPRSA ("FFS ROD"), it is now time for USEPA to offer Covanta a *de minimis* settlement as required by CERCLA.

II. THE FACTS CONCERNING COVANTA'S ALLEGED CONNECTION TO THE LPRSA

As explained briefly below and at length in the enclosed report entitled Technical Evaluation, Covanta Essex Company, Essex County Resource Recovery Facility, 183 Raymond Boulevard and 66 Blanchard Street, Newark, New Jersey, and dated August 26, 2016 from Apex Companies, LLC (the "Apex Report"), the facts surrounding Covanta's involvement with the ECRRF and Property demonstrate that Covanta is not associated with LPRSA impacts.

A. The Property Was Investigated and Remediated to NJDEP's Satisfaction Prior to Operation of the ECRRF

Prior to 1978, the Property was vacant and subjected to illegal dumping. In 1978, the NRHA acquired the Property. Apex Report at Exhibit 1. In 1981, the City of Newark and Essex County decided that the ECRRF should be developed at the Property, and enlisted the Port Authority to help develop the ECRRF. *id. at* 3. In 1983, the Port Authority selected Browning-Ferris Industries, Inc. ("BFI") to design, construct, and operate the ECRRF. *id.* In 1984, BFI Energy Systems of Essex County, Inc. (an affiliate of BFI) and Air Products Ref-Fuel of Essex County, Inc. created ARF (a New Jersey General Partnership), which subsequently assumed responsibility for constructing, and ultimately operating, the ECRRF. *id.* In December 1987, the Port Authority purchased the Property from the NRHA, and the Port Authority leased the Property to ARF effective on or about January 31, 1988. *id. at* 4. ARF began construction of the ECRRF in February 1988, and ECRRF operations began in November 1990. *id.* On June 24, 2005, Covanta Holding Corporation acquired ARF and thereafter changed the name of the company to Covanta Essex Company. *id.*

Environmental concerns at the Property were first identified in 1982 – eight years before ARF constructed and began operating the ECRRF. A site inspection identified, among other

things, abandoned vehicles, hundreds of 55-gallon drums, and two tanker trailers of waste on the Property. *id.* In 1983, groundwater sampling at the Property detected numerous priority toxic organic pollutants as well as arsenic, iron, manganese, phenol, chromium, ammonia, and total coliform above then-applicable groundwater quality standards. *id.* Pesticides were also detected in Property soils in 1983, although below toxicity parameters. *id.*

On October 31, 1984, NJDEP issued a Spill Compensation and Control Act directive requiring the NRHA to clean up the Property. ECRRF Memorandum of Understanding ¶ 3 (Sept. 11, 1987). On January 11, 1985, the NRHA and NJDEP entered into an Administrative Consent Order ("ACO") for the NRHA to complete the investigation and remediation of the Property. *id.* ¶ 4. For the next two years, the NRHA conducted significant surface removal, soil excavation, and re-grading. Apex Report at 4. On September 11, 1987, the Port Authority agreed to take responsibility for the remaining investigation and remediation of pre-existing environmental impacts at the Property. The Port Authority therefore executed a Memorandum of Understanding ("MOU") with NJDEP that required a two-phase remediation of certain portions of the Property.[1] *.id.*

From 1987 until 1989, the Port Authority remediated additional areas of the Property either by soil excavation or capping. *id.* ARF, pursuant to its contract with the Port Authority, completed the remediation required by the MOU (even though it was not a signatory to the MOU). *id.* On September 29, 1989, NJDEP determined that "no further investigation or remediation [was] required" at the Property, provided that ARF seeded, paved, or otherwise covered certain areas of the Property to "preclude the generation of dust" (which ARF promptly did). *id. at* 2-3.

B. Alleged Stormwater Nexus to the LPRSA

On August 13, 2004, USEPA issued a General Notice Letter ("GNL") to ARF for the LPRSA. Based on the documents in USEPA's files, it appears that the basis for the GNL is contaminated stormwater from the Property that subsequently discharged to the LPRSA. As explained below, these stormwater discharges are not attributable to the ECRRF, ARF, or Covanta.

In 1988 – two years before operation of the ECRRF – ARF began monitoring two stormwater ditches on the Property. Both ditches discharge to and receive backflow from the LPRSA. *id. at* 7. From 1988 until 1992, low levels of trichloroethylene, methylene chloride, benzene, zinc, petroleum hydrocarbons, and lead were detected in the stormwater outfalls. *id. at* Table 2. In addition, stormwater exceedances for fecal coliform, chemical oxygen demand, pH, and total suspended solids were identified. *id.*

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[1] The ACO was terminated contemporaneously with the execution of the MOU. [ECRRF Termination of ACO at 1 (Sept. 11, 1987) ("NJDEP and the Port Authority have entered into the MOU which is effective only, and simultaneously, with the Port Authority's acquisition of title to the Site"); *id. at* 2 ("the Port Authority, NJDEP, and NRHA desire to document the termination of the ACO").]

On December 1, 1992, NJDEP and ARF entered into an ACO that (i) established interim and final stormwater discharge limits, and (ii) required ARF to construct a stormwater management system to mitigate backflow from the Passaic River. *id. at* 6. Sampling of the stormwater ditches after 1992 also detected fecal coliform, chemical oxygen demand, and total suspended solids, and low levels of zinc, toluene, methylene chloride, and lead. *id.*

On April 15, 1997, ARF completed construction of its stormwater management system (including converting the two stormwater ditches to stormwater outfalls), *id. at* 7, which NJDEP approved on June 9, 1997. This system includes a retention basin that captures stormwater from operational areas, meaning only stormwater associated with non-operational areas (or unusual storm events) is diverted to the stormwater ditches on the Property. *id.* As a result of the NJDEP-approved stormwater management system, only negligible amounts of stormwater have been discharged from the Property to the stormwater ditches since 1997. *id.* Moreover, in 1997, Covanta modified the ECRRF's operation to make it a "zero discharge" facility, except during storm events.

In sum, only a few hazardous substances have ever been detected in stormwater at the Property, and only one – lead – is a COC for the LPRSA. *id. at* 6. Lead was detected at low levels in six different stormwater ditch sampling events at the Property (all prior to 1994), these detections are not attributable to the ECRRF or Covanta for three reasons: (i) lead was detected in Site soils *before* operation of the ECRRF; (ii) the stormwater ditches at the Property where NJPDES sampling outfalls are located are known to be affected by drainage from upgradient sources contaminated with lead (including the Ottilio landfill and other off-site industrial sources; and (iii) ditches also receive infiltration of off-site groundwater, and backflow from the LPRSA during high tide events, both of which are known to be contaminated. *id. at* 9.

III. COVANTA IS NOT LIABLE FOR LPRSA RESPONSE COSTS

In order to establish CERCLA liability, USEPA must prove that (i) "the defendant falls within one of the four categories of 'responsible parties'" under Section 107(a); (ii) "hazardous substances are disposed at a 'facility'"; (iii) "there is a 'release' or 'threatened release' of hazardous substances from the facility into the environment"; and (iv) "the release causes the incurrence of 'response costs.'" *Outlet City, Inc. v. West Chem. Prods., Inc.*, 60 Fed. Appx. 922, 926 (3d Cir. 2003) (citing *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir. 1992)). As explained below, Covanta is not liable for LPRSA response costs.

A. Covanta is Not a Potentially Responsible Party

There are four categories of potentially responsible parties ("PRPs") under CERCLA: (i) current owners and operators of the relevant CERCLA "facility"; (ii) former owners or operators of the relevant CERCLA facility at the time a hazardous substance was disposed; (iii) persons who arranged for the disposal or treatment of a hazardous substance at the relevant CERCLA facility; and (iv) persons who transported a hazardous substance to the relevant CERCLA facility. *See, e.g., Burlington Northern & Santa Fe Ry. v. United States*, 556 U.S. 599, 608-09 (2009); *Litgo N.J., Inc. v. N.J. Dep't of Envtl. Prot.*, 725 F.3d 369, 379 (3d Cir. 2013).

The CERCLA "facility" here is the LPRSA, defined as the "the 17-mile stretch of the Lower Passaic River and its tributaries from Dundee Dam to Newark Bay." [USEPA, Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study ¶ 24 (May 10, 2007) ("RI/FS AOC") ("The Lower Passaic River Study Area is a 'facility' as defined in Section 101(9) of CERCLA"); *id.* at ¶ 14(*l*) (defining LPRSA).] Covanta is not and has never been the "current owner or operator" or "former owner or operator" of the LPRSA. Nor is there is any evidence or suggestion that Covanta was a transporter of hazardous substances to the LPRSA. Accordingly, it appears that USEPA is contending that Covanta may be liable under CERCLA as an "arranger."

Arranger liability requires that Covanta took "intentional steps to dispose of a hazardous substance." *Burlington Northern*, 556 U.S. at 611. As the United States Supreme Court has explained, "intentional steps" means that it must be proven that Covanta actually ***intended*** to dispose of hazardous substances in the LPRSA. *id. at* 612 ("In order to qualify as an arranger, Shell must have entered into the sale of D-D *with the intention* that at least a portion of the product be disposed of") (emphasis added); *id. at* 612-13 ("the evidence does not support an inference that Shell *intended* such spills to occur") (emphasis added); *see also United States v. Cornell-Dubilier Elecs., Inc.*, No. 12-5407, 2014 U.S. Dist. LEXIS 140654, at *24 (D.N.J. Oct. 3, 2014) ("Nothing in the record indicates that the Government took *intentional steps to dispose of any pollutants at the facility*. In light of this lack of evidence, the Court concludes that the Settling Parties had a rational basis for finding the Government not liable as a prior arranger").

Covanta operates, and since 1997 has operated, the ECRRF as a zero discharge facility, except during unusual storm events. Apex Report at 7. The only evidence allegedly connecting Covanta to the LPRSA is the stormwater exceedances in the two ditches at the Property. These exceedances, however, are not attributable to the ECRRF or Covanta. Instead, these exceedances all stem from pre-existing contamination on the Property – property subjected to illegal dumping, previously owned by the NRHA, and currently owned by the Port Authority – as well as off-site, upgradient sources and surface water backflow from the Passaic River. Simply put, there is no evidence that Covanta "disposed of" anything in the LPRSA (*i.e.*, engaged in some active conduct that caused the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous substances in the LPRSA). *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir. 1996) ("disposal," as defined by CERCLA, requires "some active human conduct" and excludes passive migration of pre-existing contamination).

Even if evidence of the "disposal" of hazardous substances by Covanta did exist (and it does not), there is no evidence that Covanta ***intended*** to dispose of any hazardous substances in the LPRSA. Without intent, Covanta cannot be an arranger under CERCLA – even if Covanta knew or should have known that stormwater runoff carrying pre-existing contamination at the Property or contamination from other parties could discharge to the LPRSA. *Burlington Northern*, 556 U.S. at 611 ("knowledge alone is insufficient to prove that an entity 'planned for' the disposal").[2]

[2] In addition to the lack of evidence that Covanta intentionally disposed of any hazardous substances in the LPRSA, given that stormwater discharges from operational areas did not begin until 1990 at the earliest and

B. Covanta's Discharges, Even if Assumed, Have Not and Will Not Cause the Incurrence of Response Costs

Even putting aside the lack of evidence that Covanta is an arranger, there is another problem with seeking to hold Covanta liable under CERCLA for LPRSA impacts: Covanta's hazardous substances, if any, have not caused and will not cause the incurrence of response costs.

In order to be liable under CERCLA, Covanta's releases of hazardous substances must cause the incurrence of response costs. *N.J. Turnpike Auth. v. PPG Indus.*, 197 F.3d 96, 104 (3d Cir. 1999) ("In order to prove [arranger liability], our prior case law is clear that such a plaintiff 'must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs.'"); *Alcan Aluminum*, 964 F.2d at 271 (if a party "can establish that the hazardous substances in its emulsion could not, when added to other hazardous substances, have caused or contributed to the release or the resultant response costs, then it should not be liable for any of the response costs"); *see also Hatco Corp. v. W.R. Grace & Co.*, 849 F. Supp. 931, 979 (D.N.J. 1994) (determining that plaintiff was not responsible for any response costs because, even though it discharged hazardous substances, the PCBs discharged by the defendant "will drive the cost of the clean-up").

Response costs at the LPRSA are being incurred as a result of the Remedial Action of COCs: dioxins, PCBs, mercury, and DDx. [FFS ROD at 42 ("Risk-based sediment concentrations to protect human health were developed based on fish or crab tissue concentrations of COCs (dioxins, PCBs and mercury)"); *id. at* 43 ("While all of the COCs discussed in Section 7.2 cause unacceptable risks ([Hazard Quotient] greater than 1) to some or all of the [ecological] receptors evaluated, risk-based [preliminary remediation goals] were developed for dioxins, PCBs, mercury, and Total DDx, because they are representative COCs .... In addition, most active [remedial action] alternatives (i.e., alternatives other than No Action) designed to address these COCs would also address the other COCs."); *id. at* Table 25 (listing mercury, total PCBs, total DDT, and 2,3,7,8-TCDD as the hazardous substances upon which the FFS preliminary remediation goals are based).]

Said differently, although lead is a COC for the LPRSA, USEPA has determined in the FFS ROD that lead is not driving ***any*** response actions. In addition, none of the other hazardous substances detected in stormwater at the Property are COCs for the LPRSA. As hazardous substances in the Property's stormwater discharges will not cause the incurrence of LPRSA response costs, Covanta cannot be liable under CERCLA.

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ended by 1997 (when the stormwater management system was constructed), Covanta is likely entitled to the *de micromis* exemption from liability – even assuming USEPA could somehow establish that Covanta is an arranger under CERCLA. 42 U.S.C. § 9607(*o*) (a person "shall not be liable" if (i) "the total amount of the material containing hazardous substances that the person arranged for disposal ... was less than 110 gallons of liquid materials", and (ii) "all or part of the disposal ... concerned occurred before April 1, 2001").

IV. COVANTA ALREADY HAS PAID SUBSTANTIAL LPRSA RESPONSE COSTS

Despite its lack of liability, as a result of the GNL and its desire to be a good corporate citizen, Covanta has voluntarily participated in the RI/FS and RM 10.9 removal action in the LPRSA at a substantial cost. As USEPA knows, Covanta is a "Settling Funding Party" under the RI/FS AOC – a designation that speaks volumes as to Covanta's extremely tenuous connection to the LPRSA. [RI/FS AOC at Appendix A-2.]

In addition, in 2012, USEPA requested that the LPRSA Cooperating Parties Group ("CPG") perform a removal action of a sediment deposit near RM 10.9 with elevated concentrations of dioxins and PCBs. Covanta, and other CPG members (but not TMO – the dominant PRPs for the LPRSA given the intentional discharges from the Lister Site), agreed to perform the RM 10.9 removal action, which involved, in part, the dredging of approximately 16,000 cubic yards of sediment. [USEPA, Administrative Settlement Agreement and Order on Consent for Removal Action (June 18, 2012).]

V. COVANTA SEEKS A *DE MINIMIS* SETTLEMENT TO AVOID FURTHER TRANSACTION COSTS FOR THE LPRSA

USEPA has a statutory obligation to provide parties with a limited nexus to a site an opportunity to enter a *de minimis* settlement "whenever practicable" and "as promptly as possible." 42 U.S.C. § 9622(g)(1). Covanta is entitled to a *de minimis* settlement offer because, even assuming the stormwater discharges from the Property to the LPRSA are attributable to Covanta (and they are not), Covanta would meet the statutory requirements for *de minimis* status. Specifically, under CERCLA, a party is *de minimis* when both of the following are minimal in comparison to other hazardous substances at the site: (i) the amount of the hazardous substances contributed by that party to the site, and (ii) the toxic or other hazardous effects of the substances contributed by that party to the site. 42 U.S.C. § 9622(g)(1)(A). Covanta satisfies both criteria.[3]

A. Covanta's Discharges to the LPRSA, if Any, Were Minimal in Amount

CERCLA does not provide a specific threshold under which a party's discharges are considered *de minimis*. *See* 42 U.S.C. § 9622(g)(1)(A). USEPA's guidance, however, indicates that *de minimis* parties often are responsible for 1% or less of all hazardous substances at a given site. [USEPA, "Streamlined Approach for Settlements With De Minimis Waste Contributors under CERCLA Section 122(g)(l)(A)," at 2 n.5 (July 30, 1993) ("1993 *De Minimis* Guidance") ("[T]he *de minimis* cutoff has ranged from .07% to 10.0%, the mean was 1.059%, and the median was 1.0%:).]

Here, the only evidence that the Property discharged anything to the LPRSA while Covanta was operating the Property is the occasional stormwater discharges that occurred between 1990 and 1997. Apex Report at 8. It is difficult to imagine how sporadic stormwater

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[3] Covanta does not admit that it discharged any hazardous substances to the LPRSA, but merely assumes, for purposes of this discussion only, that it has responsibility for stormwater discharges from the Property in order to demonstrate its eligibility for a *de minimis* settlement offer even under a "worst case" scenario.

discharges over a 7-year period could be anything other than "minimal in comparison to other hazardous substances" in the LPRSA in terms of volume.

B. Covanta's Discharges to the LPRSA, if Any, Were Minimal in Toxicity

In order to be *de minimis* in terms of toxicity, hazardous substances attributable to Covanta must be less toxic than those hazardous substances that are driving response costs at the LPRSA. As USEPA's guidance explains:

> Even if multiple waste types exist at a site, [a finding of "minimal in comparison" for toxicity purposes] should not be burdensome. As noted above, "minimal in comparison" has been interpreted to mean "not significantly more toxic than." However, *where a particular class of wastes drives response costs substantially higher than others*, the party that contributed *that waste type* may be disqualified or a separate allocation formula may be necessary.

[USEPA, "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements at 10 (Dec. 20, 1989) (emphasis added) ("1989 *De Minimis* Guidance); *see also* 1993 *De Minimis* Guidance at 2 ("minimal toxicity" *de minimis* requirement is not met "if the hazardous substances at a site are of similar toxicity and hazardous nature").]

There can be no dispute that dioxin/furans, and to a lesser extent PCBs and DDx, are driving toxicity at the LPRSA. [FFS ROD at 29 ("The primary contributors to the excess risk [human health] are dioxins/furans (70 percent for fish consumption and 82 percent for crab consumption), dioxin-like PCBs (11 percent for fish consumption and 12 percent for crab consumption), and non-dioxin-like PCBs (16 percent for fish consumption and 5 percent for crab consumption). *The other COPCs contributed a combined 3 percent to the excess cancer risk.*") (emphasis added); *id. at* 30 ("Dioxins/furans and PCBs combined contribute more than approximately 98 percent of the excess hazard, while the remaining excess hazard is associated with methyl mercury for all receptors for ingestion of both fish and crab.").]

Covanta's alleged nexus to the LPRSA is not associated with dioxins/furans, PCBs, or mercury. That lack of connection is more than sufficient to establish that any hazardous substances attributable to Covanta present minimal toxicity when compared to other hazardous substances in the LPRSA.

C. Offering Covanta a *De Minimis* Settlement Is in the Public Interest

As Covanta satisfies the statutory requirements for a *de minimis* settlement, the only remaining question is whether such a settlement is "in the public interest." 42 U.S.C. § 9622(g)(1)(A). The answer is a resounding "yes." As USEPA's own guidance recognizes, entering into a final *de minimis* settlement with Covanta now would have several benefits, including (i) reducing transaction costs for Covanta and USEPA, (ii) reimbursing USEPA's past costs, (iii) providing funds for future response actions at the LPRSA, and (iv) providing an incentive for non-*de minimis* parties to settle their potential liability. [USEPA, Standardizing the *De Minimis* Premium, at 1 (July 7, 1995) ("In addition to reducing transaction costs and

resolving the liability of small volume contributors, *de minimis* settlements also serve to reimburse the Agency's past costs and provide funds for future site cleanup."); 1989 *De Minimis* Guidance at 2 (*de minimis* settlements "provide an incentive to non-*de minimis* parties to settle simultaneously by offsetting the contributions of *de minimis* parties from the total cost of the response action").

VI. CONCLUSION

Covanta has already paid its fair share of any LPRSA response costs. In fact, it has grossly overpaid, as Covanta operates a zero discharge facility and there is no evidence that the ECRRF or Covanta have any connection to LPRSA COCs. Despite its lack of liability, Covanta is willing to discuss and negotiate a *de minimis* settlement with USEPA to avoid further transaction costs for the LPRSA matter.

Sincerely,

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP

Barbara Hopkinson Kelly

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